**Before the**

**FEDERAL TRADE COMMISSION**

**Washington, D.C. 20580**

**COMMENTS OF**

**RECORDING INDUSTRY ASSOCATION OF AMERICA (RIAA)**

**CAN-SPAM ACT RULEMAKING**

**Project No. R411008**
**(Notice of Proposed Rulemaking)**

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The Recording Industry Association of American (RIAA) appreciates this opportunity to comment on the topic of "Forward to a friend," raised within the Commission's Notice of Proposed Rulemaking (Notice) captioned above.[1] Although the Notice does not propose any changes in the CAN-SPAM Rule with regard to the situation in which a commercial e-mail message is forwarded by the original recipient (*i.e.*, "forwarding to a friend"), the Notice contains (at pages 25440-42) a detailed discussion of how the Commission would apply various definitions in the statute and rule to such a situation. RIAA believes that the interpretations set forth in this discussion would unduly restrict the use of "forward to a friend" capabilities, in a manner that is inconsistent with the legislative intent of the CAN-SPAM Act, and that unnecessarily implicates First Amendment concerns. We urge the Commission to reconsider these interpretations.

Many commercial e-mail messages sent by RIAA member companies, like those of other businesses that use e-mail to promote their products and services, provide recipients with a convenient click-through facility for forwarding the message to a third party. People who receive a message promoting a particular artist, concert event, or genre of music, for example, probably know other people who enjoy that artist or genre as much as, or even more than, the original recipient. By making it easy and convenient for recipients to pass along these messages by using a "forward to a friend" button or similar mechanism, record labels are engaging in a long-standing practice that certainly predates the contemporary concept of marketing in the digital world itself. While modern marketing gurus might choose to label this practice as "viral marketing" or apply some other buzzword, in fact the "forward to a friend" capability is nothing more than a way of facilitating the word-of-mouth promotion that businesses have been seeking to generate since time immemorial.

Under the Commission's interpretation of CAN-SPAM, what merchants do in virtually every other marketplace to facilitate word-of-mouth promotion would be severely restricted in the online environment. The issue at hand is whether the original source of the commercial e-mail message – in our case, the record label – is still considered to be the "sender" of the message if the original recipient takes up the invitation to "forward to a friend." If so, the label will be strictly liable if the friend to which the message is forwarded has previously opted out of receiving commercial messages from that label. This would be true even though the label has absolutely no control over the persons to whom the original recipient chooses to forward the message, and even though the original recipient may be entirely unaware that the ultimate recipient has opted out of receiving such messages. Under the Commission's reading, the label is equally exposed to liability under CAN-SPAM even if the original recipient deletes from the message any of the material which the statute requires to be included in a commercial e-mail message (such as the notification of an opt-out mechanism or the inclusion of a valid physical postal address). Because record labels lack any meaningful ability to manage the risk of liability in this situation, they will have no practical alternative but to refrain from inviting consumers to "forward to a friend" in virtually all circumstances.

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[1] The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

In the Notice, the Commission indicates (at page 25,441) that the mere provision of a "forward to a friend" capability, without more, would "likely" not subject the originating label to CAN-SPAM requirements. However, if the original source does or says anything "designed to encourage or prompt" the original recipient to use this capability, the outcome is different. In that instance, the Commission asserts, the original source may be held to have "intentionally induced" the sending of the forwarded message, and thus will be treated as having "procured" its initiation within the meaning of the CAN-SPAM statute—potentially even based upon the addition of merely trivial language. Because the statute provides that anyone who procures initiation of a message is itself an initiator, and that any initiator whose products and services are also advertised in the message qualifies as its "sender," the action or speech that is "designed to encourage or prompt" the consumer to engage in word-of-mouth promotion leads inexorably to the unmanageable liability exposure that accompanies "sender" status.

Meaning of "Procure"

The example given by the Commission in footnote 178 of the Notice illustrates how far-reaching an impact this interpretation would have. The Commission opines that a record label or other original sender would "likely" be considered to have "procured" the forwarding of a message if its original message included the following text: "Tell-A-Friend – Help spread the word by forwarding this message for friends! To share this message with a friend or colleague, click the 'Forward E-mail' button." If such a harmless statement – which is not misleading, not deceptive, and not coercive, and which promises no benefit for accepting the invitation – is enough to make the original source the "sender," then it is hard to conceive just what a record label could say about the forward-to-a friend mechanism without incurring CAN-SPAM liability. Its only practical choice would be to say nothing.

The Commission's interpretation is based on its reading of the statutory definition of what it means to "procure" the sending of a commercial e-mail message: "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf." 15 USC § 7702(12). Under the Commission's analysis, to say or do anything to encourage forwarding is to "induce" it, and thus to "procure" it. But the evidence from the text and legislative history of the statute casts considerable doubt upon this broad reading.[2]

[2] Nor does the record in this proceeding provide any substantial support to the Commission's interpretation. Indeed, of the three comments cited by the Commission in footnote 169 of the Notice, two evidently do not support the Commission's interpretation. *See e.g.,* Go Daddy, No. OL-105340 at 6 (replying "No" to the question "Do 'forward-to-a-friend' and similar marketing campaigns that rely on customers to refer or forward commercial e-mails to someone else fall within the parameters of 'inducing' a person to initiate a message on behalf of someone else?"); Karl Krueger, No. OL-101998, at 1 (stating "A recipient's freely-chosen act of forwarding a solicited commercial message directly to another person should not incur obligations on the part of that message's sender"). Only the comment of National Consumers League (No. OL-105186, at 2-3) equates encouragement to forward with inducement to initiate a message.

The source of the statutory definition of "procure" is S. 877, which ultimately became the legislative vehicle on which CAN-SPAM was enacted. As reported by the Senate Commerce Committee on July 16, 2003, the bill contained a definition of "procure" which was identical in all relevant respects to the definition that was enacted.[3] The Committee's report on S. 877 gives a straightforward explanation of what the Committee meant to encompass by this definition: "**The intent of this definition is to make a company responsible for e-mail messages that it hires a third party to send…**" S. REPT. 108-102, at 15 (emphasis added).[4] Clearly, by treating those who "procure initiation" of a commercial e-mail the same as those who initiate it themselves, all the Committee meant to accomplish was to prevent marketers from evading responsibility by paying someone else to actually send messages in a way that violates the Act. There is no indication anywhere in the legislative history that Congress intended that a marketer who simply invited a consumer to forward a message should be treated as having "procured the initiation" of that message.[5]

Meaning of "Induce"

The Commission turns to the 1938 edition of "Webster's New International Dictionary" (at page 25,441 n. 177) to determine what Congress meant in 2003 when it included "induce" in the definition of "procure"; but more persuasive sources are much closer at hand. These sources suggest that Congress meant to reach, not all statements "designed to encourage or prompt" the sending of an e-mail message, but only those that rely upon deception or misrepresentation to do so.

The only other use of the word "induce" in the CAN-SPAM Act itself comes in the Congressional finding that "many senders of unsolicited commercial electronic mail purposefully include misleading information in the messages subject line in order to induce the recipients to view the message." Pub. L. No. 108-187, §2(a)(8) (2003). In that provision of the legislation, Congress clearly used "induce" to refer only to persuasion based on misleading or deceptive activity. There is no basis for assuming that

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[3] The Senate-reported definition was narrower than as finally enacted because it included a state of mind requirement, i.e., "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf, knowing, or consciously avoiding knowing, the extent to which that person intends to comply with the requirements of the Act." S. 877, sec. 3(13). This state of mind requirement was later dropped from the definition.

[4] The remainder of the explanation of the definition of "procure" in the Senate Report concerns the state of mind requirement which did not survive into the final version of CAN-SPAM:" … unless the third party engages in renegade behavior that the hiring company did not know about. However, the hiring company cannot avoid responsibility by purposefully remaining ignorant of the third party's practices. " S. REPT. 108-102, at 15.

[5] This legislative history also casts doubt on whether Congress intended that the furnishing of merely nominal consideration – for instance, "points" to be accumulated toward the award of a free CD or music download – would be enough to qualify as "procuring" the forwarding of a commercial e-mail. Surely when one company "hires" another to carry out a commercial e-mail campaign, much more than nominal consideration would be involved. RIAA urges the Commission to clarify that a de minimis approach applies here as it does with respect to other aspects of the CAN-SPAM Rules, and that the "consideration" provided in return for forwarding must be of more than nominal value before it can be said to have "procured" the forwarding of a message.

it meant a much broader definition when it used the same word a few pages later in the same legislation.

Indeed, during the Congressional consideration of the legislation that became CAN-SPAM, representatives of the Commission itself used the word "induce" in a much narrower context than the broad definition espoused in the Notice. S*ee, e.g., Hearing on Unsolicited Commercial Email before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong. 52 (April 26, 2001) (Statement of Eileen Harrington, Federal Trade Commission's Bureau of Consumer Protection) (emphasis added) (describing "scammers" that misrepresent the nature of their products in spam emails in order to "**induce** consumers to purchase" illegal services). Even the record of Commission rulemaking under CAN-SPAM itself – and in this very proceeding -- is replete with examples in which the Commission used the word "induce" to refer to persuasion through the use of misrepresentation or pretense. S*ee* Definitions and Implementation Under the CAN-SPAM Act, 70 Fed. Reg. 3,110, 3,115 (F.T.C. Jan. 19, 2005) (emphasis added) (warning senders of spam messages who may be "tempted to use misrepresentations in the subject line to **induce** recipients to open their messages" that the CAN-Spam Act forbids such activity); Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act; Proposed Rule, 70 Fed. Reg. 25,426, 25,431 (F.T.C. May 12, 2005) (emphasis added) (discussing deceptive emails "where the sender pretends to be someone else to **induce** the recipient to open the email message"). Indeed, such a narrow usage is entirely consistent with what the Commission usually is referring to when it speaks of inducement: persuasion within the context of deceptive or misleading business practices.[6] While it is not completely unprecedented for the Commission to use "inducement" to refer to speech that is non-deceptive, non-misleading, and non-coercive,[7] it is certainly unusual for it do so. This fact, coupled with the complete absence of support for this reading in the other text or legislative history of

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[6] *See e.g.*, Telebrands Corporation, No. 9313, 2004 FTC LEXIS 154, at *75 (initial decision) (emphasis added) (stating while citing 15 U.S.C. §45, 52, 55 that the "FTC Act makes it unlawful to engage in unfair or deceptive practices or to **induce** consumers to purchase certain products through advertising that is misleading in a material respect"); *Hearing on Abusive Practices in Credit Counseling before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 108th Cong. 29 (March 24, 2004) (Prepared Statement of the Federal Trade Commission) (emphasis added) (explaining that financial services use "deceptive practices to **induce** consumers" into unwise loans); Shell Oil Co., 128 F.T.C. 749, n.7 (1999), No. C-3912, 1999 FTC LEXIS 208, at *22 (Swindle, C. dissenting) (emphasis added) (discussing "deceptive claims made in advertising . . . to **induce** sales of its own product"); Kraft, Inc., 114 F.T.C. 40 (1991), No. 9206, 1991 FTC LEXIS 38, at *7 (final order) (emphasis added) (stating that the Federal Trade Act "prohibits false advertising likely to **induce** the purchase of food, drugs, or services"); General Nutrition, Inc., 113 F.T.C. 146 (1986), No. 9175, 1986 FTC LEXIS 74 at *140 (initial decision) (emphasis added) (explaining that the "absence of support for claims that imply a reasonable basis is likely to mislead consumers and **induce** consumers to purchase a product").

[7] See, e.g., Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,590 (F.T.C. Jan. 29, 2003) (first emphasis added) (explaining that if an otherwise exempt organization "were to engage in a 'plan, program, or campaign' involving more than one interstate telephone call to **induce** a purchase of goods or services *or* a charitable contribution, that activity would" fall under the Telemarketing Sales Rule). Even in this instance, there is a clear factual difference between a concerted "plan, program or campaign," and the one – or two-sentence statement which the Commission is prepared to treat as "inducement" under CAN-SPAM.

the statute itself, certainly counsels a re-examination of the interpretation set forth in the Notice.

Constitutional Concerns

Further justification for such a re-examination of the meaning of "induce" flows from a consideration of the potential constitutional implications of reading the word as the Notice requires. Under that reading, a marketer's exposure to liability under CAN-SPAM in the "forward to a friend" scenario could well turn on difficult questions of line-drawing among myriad slightly different formulations of non-deceptive, non-misleading and non-coercive speech. If virtually anything that a record label says or does to invite e-mail recipients to forward a message is enough to make the label the "sender" of the forwarded message, the result of the Commission's interpretation will simply be to suppress one species of truthful and not misleading commercial speech. Surely this raises substantial questions under the *Central Hudson* test[8] as to whether such regulation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[9] The complexity of this issue is further illustrated by an example in which an artist sends an email to members of his fan club, promoting his new song (now on sale) that has a political theme, and encouraging them to forward the e-mail in order to get the word out to others about that political message, whether or not they buy a copy of the song. Is it commercial or political speech that is being regulated in this instance?

Without conducting a full-blown constitutional analysis here, it seems clear that an effective ban on speech that encourages the use of a "forward to a friend" capability would be vulnerable to a serious First Amendment challenge. For instance, forwarded commercial e-mail is probably less likely to reach recipients who find it unwelcome than many other types of commercial e-mails, sent directly by marketers, which CAN-SPAM permits. A record label could, if it wished, send an e-mail message about the new album from country music artist Toby Keith to anyone who had not opted out of receiving messages from that label; but the message is more likely to reach a Toby Keith fan if instead it is forwarded to a third party by an original recipient who knows the third party's musical tastes. The net impact of the Commission's interpretation thus may hamper, not advance, the governmental interest in shielding citizens from unwanted commercial e-mail messages, or at least sweep far too broadly by preventing citizens from receiving commercial e-mails that they would be interested in. Such a result would also run afoul of the justification for First Amendment protection of commercial speech: "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[10]

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[8] *See* Central Hudson Gas & Electric Corp. v. Public Services Commission of New York, 447 U.S. 557, 563 (1980).
[9] *Id.*, 447 U.S. at 566.
[10] *See id.* at 561-62 (citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

RIAA urges the Commission to avoid this serious constitutional controversy, as well as to better reflect the intent of Congress and its own past practice, by re-examining the position taken in the Notice, and construing "induce" to apply only to efforts to persuade others, through the use of deception or misleading statements, to initiate or forward e-mail messages.[11]

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RIAA appreciates the opportunity to participate in these proceedings and looks forward to further discussion on this topic of CAN-SPAM.

[11] Potentially, some other scenarios could merit the label of inducement. For instance, if an e-mail marketer explicitly encouraged the original recipient to forward a message to a third party who the marketer knew had already opted out of receiving further messages from that marketer, this would conform closely – but for the absence of consideration – to the scenario that the Senate Report states that Congress intended to reach by the term "procure." *See* S. REPT. 108-102, discussed in text above.